STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH PALAZZOLA,

Plaintiff-Appellant,

v

CITY OF FRASER CONSOLIDATED RETIREMENT SYSTEM and BOARD OF THE CITY OF FRASER CONSOLIDATED RETIREMENT SYSTEM,

Defendants-Appellees.

UNPUBLISHED
August 8, 2006

No. 257715
Macomb Circuit Court
LC No. 2003-003503-CK

Before: Owens, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

Plaintiff brought this action against defendants City of Fraser Consolidated Retirement System (the "System") and its governing board (the "Board"), claiming that defendants improperly determined the amount of his late retirement benefit under the city's retirement plan. The trial court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff appeals as of right. We affirm.

Plaintiff brought this action against defendants after they resolved an ambiguity in the contract governing plaintiff's retirement benefits in a manner that resulted in plaintiff receiving a lesser benefit than he believed he was entitled. The ambiguity arose from the inclusion of a sample calculation demonstrating how to calculate a participant's late retirement benefit. The sample calculation used an annualized expression of the participant's Final Average Compensation ("FAC"), multiplied by a percentage based on the length of time the participant worked beyond his normal retirement date. This product was then multiplied by the number of *months* the participant worked following his normal retirement date. This sample calculation for the late retirement benefit was inconsistent with a sample calculation showing how to determine a participant's normal retirement benefit, which used a formula that used an annualized FAC, multiplied by the applicable percentage, the product of which was then multiplied by the number of *years* the participant worked. Before plaintiff retired, Thomas Van Damme, a Board member and the plan trustee discovered the inconsistency and asked the Board members to correct the problem by replacing the page that showed the incorrect sample calculation.

When plaintiff retired, he maintained that his late retirement benefit should be calculated according to the original sample calculation. Defendants maintained that the original sample

calculation was contrary to the plan's language, and that the Board properly exercised its authority to interpret the plan by replacing the page. Plaintiff filed the instant action, asserting claims for breach of contract, breach of fiduciary duty, mandamus, and declaratory relief.[1] All of these claims were predicated on the theory that the plan was ambiguous, but that a trier of fact was required to resolve the ambiguity and interpret the plan.

Defendants moved for summary disposition under MCR 2.116(C)(10), submitting that there was no genuine issue of fact that the Board had the discretion to interpret the plan, and that its interpretation was not arbitrary or capricious. The trial court agreed and granted the motion.

We review de novo a trial court's resolution of a motion for summary disposition. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Kraft v Detroit Entertainment, LLC*, 261 Mich App 534, 539; 683 NW2d 200 (2004). Summary disposition should be granted if there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 540; MCR 2.116(C)(10) and (G)(4).

As a preliminary matter, we agree with defendants that the Board's decision resolving the ambiguity arising from the conflicting plan language and sample calculations is subject to an arbitrary and capricious standard of review because § 3.3.a of the plan provides that the Board "has the power determine all issues in connection with the administration, interpretation, and application of the provisions of the Retirement System and this Document," and § 3.3.b.5 further provides that the Board "has all powers necessary or appropriate to accomplish the duties assigned to it under this document," including the power "[t]o interpret the provisions of this document." Cf. *Guiles v Univ of Michigan Bd of Regents*, 193 Mich App 39, 46-47; 483 NW2d 637 (1992). Indeed, plaintiff does not dispute that the arbitrary and capricious standard applies, but rather argues that the Board did not validly exercise its authority to interpret the plan, or that, if it did, its interpretation was arbitrary and capricious.

Plaintiff argues that the page switch that took place at the pension meeting on March 1, 2002, was ineffective, because this change was initiated by the trustee, Thomas Van Damme, who did not have the authority to interpret the plan. We find no merit to this argument because Van Damme was a Board member as well as the trustee. It was the Board, not Van Damme, that properly exercised its authority to interpret the Plan by concurring with his request to correct the error he discovered.

Plaintiff also argues that the Board's decision to interpret the plan was arbitrary and capricious, but this argument is premised solely on plaintiff's contention that the Board violated the Open Meetings Act, MCL 15.261 *et seq.*, because it went into a closed "executive session" when it voted to interpret the plan at its October 29, 2003, meeting. Plaintiff raises this argument for the first time on appeal. More significantly, plaintiff did not timely bring an action to

[1] Plaintiff also alleged a claim of promissory estoppel, but has not challenged the dismissal of the claim on appeal.

invalidate the Board's decision on the basis that it violated the Open Meetings Act. MCL 15.270(3) provides:

> The circuit court shall not have jurisdiction to invalidate a decision of a public body for a violation of this act unless an action is commenced pursuant to this section within the following specific period of time:
>
> (a) Within 60 days after the approved minutes are made available to the public by the public body except as otherwise provided in subdivision (b).[2]

Because plaintiff did not timely bring an action to invalidate the Board's October 29, 2003, decision for violation of the Open Meetings Act, he may not now belatedly attack the Board's decision on this ground. We therefore reject plaintiff's claim of error.

Affirmed.

/s/ Donald S. Owens
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood

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[2] Subsection (b) is not applicable to this case.